

NEWSLETTER

NEW VBER Guidelines – European Commission does not approve MAP but opens up new and various avenues

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Berlin 31.05.2022 **The European Commission has adopted the new Block Exemption Regulation for Vertical Agreements** ("Vertical Block Exemption Regulation - VBER"), which is complemented by the **new Vertical Guidelines**. The two revised regulatory frameworks will enter into force across Europe on 1 June 2022. Each of them will expire on 31 May 2034. The new Regulation is binding in its entirety and directly applicable in every Member State of the EU and will provide a one-year transition period for existing contracts.

Distributors and retailers in the distribution chain will be asked to review existing contracts to see if they are in line with the new rules. EMIA is constantly working to get a better understanding from the EU Commission of the current challenges in the MI market. This is precisely why the new changes to the Vertical Guidelines also offer new opportunities and scope for business development: **dual pricing, agency agreements, exclusive distribution systems** or **RPM** and **MAP** (as it is now prescribed by the EU Commission) offer alternative and new scope in competition.

MAP, as first provided in the draft guidelines (MAP; para. 174) and desired by EMIA and other stakeholders in the European Market, has unfortunately not been approved and cannot be applied in a conventional sense (as for example in the USA). In the end, the pressure of consumer groups and some stakeholders on the EU Commission and the Directorate-General Competition (DG COMP) was too strong. The recommendation of the EU Parliament, written by Brando Benifei (ITA; Member of the European Parliament), was not taken into consideration by the EU Commission in its entirety, but led them reconsider some of its positions on the MAP and other important points on SME competition in the new guidelines.

We know, the EU Commission has taken careful note of our comments, written contributions and statements and that our input has had a significant impact on the general framework of the new guidelines. Sophie Moonen

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(Head of Unit - A1 Antitrust case support and policy / Directorate-General for Competition) informed us in a personal letter, days before the final adoption, that new guidelines would be introduced which would make the previous ones more flexible and possibly also opens up new and various avenues for our industry and sector. Therefore, it is exciting to see a MAP appear in the new guidelines that needs our attention. In detail, a MAP is mentioned in the new VBER guidelines:

'A minimum resale price or MAP can be used to prevent a particular distributor from using the product of a supplier as a loss leader. Where a distributor regularly resells a product below the wholesale price, this can damage the brand image of the product and, over time, reduce overall demand for the product and undermine the supplier's incentives to invest in quality and brand image. In that case, preventing that distributor from selling below the wholesale price, by imposing on it a targeted minimum resale price or MAP may be considered on balance pro-competitive.'

Source: Guidelines on vertical restraints (para 197 (c))

In addition, **RPM (resale price maintenance) or MAP (minimum advertised price) will be allowed in exceptional cases if they have an overall pro-competitive effect.**

For example:

- **As part of a temporary pricing campaign to support a new product launch where there are no realistic and less restrictive alternative means of incentivizing the resellers to promote the product.**
- **As part of a coordinated short-term low-price campaign, in particular, where the supplier applies a uniform distribution format across its retailer network.**
- **To protect retailers that make investments in additional pre-sales services in order to be able to sell and demonstrate complex products from free-riding by others.**

The thresholds of the new guidelines for these potential MAP exemptions are high, and it still carries significant uncertainty and potentially high risk. Now each EU Member State will have to go deeper into the new rules and figure out how to enforce them without running into legal problems. EMIA will screen some of these aspects, which will then have to be officially verified and confirmed by national and local authorities as well as legal counsel.

At this point we can certainly say, that the European Commission has finally taken a much more pragmatic stance on the MAP which is very encouraging and as the scope of these potential exemptions (and the attitude of the national competition authorities) become clearer, we can certainly expect to see more and more European companies following and adopting these new guidelines.

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Another very important concession of the European Commission: **The new rules now also state that it does not constitute RPM if a supplier enters into a price agreement with a specific customer and then enters into an agreement with a reseller that it has selected for the purpose of executing ("fulfilling") that supply agreement and is therefore bound by the price already agreed.**

Furthermore, with the new guidelines **it will be possible to apply 'dual pricing', with different prices for physical and online shops, on a permanent basis** as also strongly requested by the EMIA. This is an example of an area where the new rules represent a very significant change and highlight the need for protection of the physical shops. **It will no longer be a hardcore restriction of competition if a supplier charges different wholesale prices to physical stores and online stores.**

Other great opportunity for the entire MI industry - **the issue of 'agency contracts' has been revised and expanded within the new guidelines. In particular, the guidelines now explain under which circumstances combined dealer/retailer agency distribution (e.g. separation between basic and premium products) is permitted.**

As you can see, the new VBER guidelines introduce many important innovations that can certainly help our musical instrument market compete: EMIA was in this context an important political stakeholder in these new rules. Now EMIA, together with external consultants, is making a detailed analysis of all the new guidelines to assess their risks and, most importantly, how they can actually be applied without possible sanctions. Only an alliance like EMIA can do such work on behalf of the MI industry.

We will keep you updated on this EMIA success as we found out more details about the implementation of these new guidelines in our great European Market.

Background: European Musical Instrument Alliance (EMIA)

The European Musical Instrument Alliance (EMIA) is an alliance of major European trade associations in the musical instrument industry. It sees itself as a forum and discourse space for relevant national and international associations and organisations with the aim of identifying, discussing, shaping and optimising the economic and legal framework conditions for all areas of the musical instrument industry and addressing them vis-à-vis politicians.

The EMIA stands up for the cultural and economic interests of the musical instrument and music equipment industry on a national and European level, with the aim of strengthening the competitiveness of the industry in all market sectors, helping to shape the political and legal framework conditions according to the requirements of the industry, and promoting up-to-date further and advanced training in music, as well as intensifying active music making and music skills in society.

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